No. 15-105

# In the Supreme Court of the United States

LITTLE SISTERS OF THE POOR HOME FOR THE AGED, DENVER COLORADO, ET AL., PETITIONERS,

v.

SYLVIA MATHEWS BURWELL, SECRETARY OF HEALTH & HUMAN SERVICES, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT*

## BRIEF OF THE STATES OF TEXAS, OHIO, ALABAMA, ARIZONA, COLORADO, FLORIDA, GEORGIA, IDAHO, KANSAS, LOUISIANA, MICHIGAN, MONTANA, NEBRASKA, NEVADA, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, UTAH, WEST VIRGINIA, AND WISCONSIN AS *AMICI CURIAE* SUPPORTING PETITIONERS


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## INTEREST OF *AMICI CURIAE*

*Amici* are the States of Texas, Ohio, Alabama, Arizona, Colorado, Florida, Georgia, Idaho, Kansas, Louisiana, Michigan, Montana, Nebraska, Nevada, Oklahoma, South Carolina, South Dakota, Utah, West Virginia, and Wisconsin. They support review of the questions presented because of their interest in the participation of religious nonprofits as vibrant and vital threads in the social fabric of the States. Religious nonprofits serve their communities in a variety of ways, from caring for the youngest members of society, to serving the elderly with compassion, to providing the educations that allow individuals to pursue their own contributions. It is paramount to the *amici* States that religious nonprofits such as the institutions here can continue with those contributions. But erecting impediments to their continued adherence to their religious beliefs can threaten their continued work, which is driven and shaped by those beliefs.

Moreover, the States have a substantial interest in ensuring that courts and the federal government respect religious beliefs by refusing to second-guess religious adherents' line-drawing about what conduct is prohibited to them as sinful or immoral. The States' commitment to guarding the dignity of religious convictions is reflected in many of the States' own laws. Twenty States statutorily protect religious liberty

from government intrusion.[1] Others States include in their constitutions protections that go beyond rights recognized under the Free Exercise Clause of the First Amendment.[2]

The *amici* States thus have a substantial interest in protecting religious exercise from governmental intrusion. That interest is even more acute when religious practice is burdened not by congressional enactments, but by federal executive directives that do not pursue their ends in the manner least restrictive of religious liberty. Such executive action skirts the rules laid down in RFRA, a bipartisan enactment about the respect due to religious adherents in our pluralistic society.

## SUMMARY OF ARGUMENT

The Little Sisters of the Poor seek a more modest exemption from the contraceptive mandate than is already afforded to many employers for secular reasons. The government already excludes from the contracep-

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[1] Such general laws, often called State RFRAs, have been enacted in Alabama, Arizona, Arkansas, Connecticut, Florida, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, New Mexico, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, and Virginia. *See infra* p. 27 (citations).

[2] *See, e.g.*, Ala. Const. art. I, § 3.01; *Humphrey v. Lane*, 728 N.E.2d 1039, 1043 (Ohio 2000) (holding that Article I, § 7, of the Ohio Constitution requires strict scrutiny even for a generally applicable, religion-neutral regulation that burdens religious exercise).

tive mandate employers with a "grandfathered" insurance plan, meaning a plan that has not been materially changed after a cutoff date (which was before the contraceptive mandate was proposed). *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2766 (2014). That limitation is provided as an administrative convenience to employers, and it covers about 50 million people (as of 2013). *Id.* at 2764. Additionally, employers of fewer than 50 full-time workers are not subject to the mandate, and those employers collectively employ about 34 million people. *Id.*

Petitioners seek a similar exclusion. Their position is based not on the secular burden of administrative inconvenience, but on a sincere religious conviction that complying with the contraceptive mandate is forbidden to them. The government already accommodates that religious conviction by providing an exemption for churches and their integrated auxiliaries—yet another exemption to the mandate. But the Executive refuses to provide that same exemption to other nonprofit religious employers.

RFRA entitles petitioners to scrutiny of the Executive's justification for depriving them of that exemption. The Little Sisters of the Poor and their co-petitioners share with churches the same religious conviction about providing health insurance in a way that does not create legal obligations to provide or facilitate insurance coverage for contraceptives. The existence and sincerity of that religious conviction is not disputed. And the Executive's regulation substantially burdens petitioners in seeking to abide by that religious conviction, as they are subject to substantial

monetary liability for noncompliance. Those conclusions establish that RFRA scrutiny applies.

In considering RFRA, however, several courts have departed from this Court's instructions in *Hobby Lobby*. Under RFRA's substantial-burden inquiry, courts should judge whether the government coerces a person to act in a way the person sincerely believes violates religious principle and whether the coercion is substantial. Going beyond that inquiry—attempting to judge whether the religious conviction itself is valid or justified—inserts courts into areas reserved for religious debate. Religious adherents will not all have the same answers on such theological questions. But for courts to privilege their views on such religious determinations over adherents' views undermines the respect and tolerance enshrined in RFRA.

Whether RFRA allows the lower court's approach to the substantial-burden inquiry is an important question deserving this Court's attention. There is no value to further delay. The issue has sufficiently percolated in the lower courts, and there is no prospect that the confusion will resolve itself with time.

A proper approach to the substantial-burden test will vindicate Congress's design. Rather than the Executive side-stepping any scrutiny of how its contraceptive mandate comports with religious liberty, its regulatory means will be measured against other means that would achieve a compelling governmental interest. That balancing reflects traditions of religious tolerance that are foundational to this country.

And the Executive has not demonstrated that its mandate to petitioners is the least restrictive means

of achieving a compelling governmental interest, as RFRA requires. *See* 42 U.S.C. § 2000bb-1. It is difficult to see a basis for applying this mandate against the Little Sisters of the Poor rather than using whatever methods the government deems acceptable for employees of churches and of other employers already excluded from the mandate.

## ARGUMENT

Many employers around the country are driven by their faith to care for their employees by providing them health insurance. But some employers find it incompatible with their religious convictions to provide that health insurance when it means contracting with a company that then, by virtue of that very relationship, becomes obligated to cover contraceptives, including some that are regarded as abortifacients. The validity of such religious line-drawing is not for courts to second-guess:

> Arrogating the authority to provide a binding national answer to this religious and philosophical question, HHS and the principal dissent in effect tell the plaintiffs that their beliefs are flawed. For good reason, we have repeatedly refused to take such a step.

*Hobby Lobby*, 134 S. Ct. at 2778 (footnote omitted).

Before the contraceptive mandate, employers could abide by that religious belief by offering health insurance without engaging in an insurance relationship that would obligate coverage for contraceptives. After the contraceptive mandate, however, some employers are unable to abide by that religious belief

without incurring substantial financial liability. If they provide notice of their objection to contraceptive coverage and continue to engage a company to issue or administer health insurance for their employees, that company is then and only then legally required to cover contraceptives, some of which the religious employers regard as killing human life. The supposed "accommodation" offered by the government does not change that fact, because how a hired company pays for the drugs is immaterial to this religious belief. Hence, the mandate will coerce employers to proceed with a course of action despite a belief in its religious impermissibility, because the alternative is not providing health insurance at all and thus violating federal regulations and incurring serious fines.

That dilemma is faced by only some employers with those religious convictions. The Executive has recognized the religious-liberty burden and therefore exempted churches (as well their integrated auxiliaries and associations of churches) from the contraceptive mandate, relieving them of the coercion to violate their religious beliefs in providing health insurance. Those employers can still hire an insurance issuer or administrator to provide insurance for their employees without violating their religious convictions by that act. *See Hobby Lobby*, 134 S. Ct. at 2763 (noting exemption); 45 C.F.R. § 147.131 (authorizing exemption). There is no apparent reason why the religious-liberty burden that underlies this exemption for churches does not even *count* under RFRA when felt by religious charities, schools, and other nonprofits holding the same religious beliefs.

The contraceptive mandate's ongoing coercion of employers to violate their religious convictions has led to nationwide litigation and confusion about the validity of the mandate in its full reach. Challenges remain pending in multiple circuits, and the circuit and district judges who have addressed this issue have issued lengthy opinions reaching different conclusions.

The cost of that ongoing doubt is significant; it has tremendous financial and spiritual repercussions for objecting employers. Legal challenges continue to simmer nationwide, and there is no visible prospect of orderly resolution without this Court's review. In short, the question whether the alternative method of mandate compliance justifies departure from *Hobby Lobby*'s approach to RFRA is an "important question of federal law" that warrants nationwide resolution. *See* Sup. Ct. R. 10(c); *see also Gonzales v. Raich*, 545 U.S. 1, 9 (2005) ("The obvious importance of the case prompted our grant of certiorari.").

## I. There Is Little Value To Percolation: Uncertainty About How RFRA Applies To The Contraceptive Mandate Will Continue Absent This Court's Review.

The manner in which RFRA's substantial-burden test applies to the contraceptive mandate, now that the government is relying on the mandate's self-described "accommodation," is in serious dispute. *Hobby Lobby* instructs that RFRA's substantial-burden test does not allow courts to question religious adherents' judgment that certain conduct makes the adherents morally complicit and is therefore forbidden to them.

134 S. Ct. at 2778. Under *Hobby Lobby*, the substantial-burden test instead looks at whether a regulation "demands that [practitioners] engage in conduct that seriously violates their religious beliefs," *id.* at 2775, and whether the consequences of not yielding to the regulatory command are substantial, *id.* at 2776 (noting that the fines at issue are "surely substantial"); *id.* at 2779.

The objecting religious nonprofits in the many cases working their way through the courts have made clear their religious conviction that they may not include certain drugs under their insurance or hire an insurance issuer or administrator that then must cover those drugs. No one doubts the sincerity of that conviction. Before the mandate, the religious nonprofits could adhere to that conviction. After the mandate, the nonprofits are forced to proceed in one of those two objectionable ways, or else pay a hefty fine.

*Hobby Lobby*'s reasoning directs that this mandate constitutes a substantial burden on the objectors' religious exercise, as it triggers serious consequences for adherents who decline to behave in a way contrary to their religious beliefs. Nonetheless, several courts of appeals have held that RFRA scrutiny does not even apply on the ground that no substantial burden exists.

Their reasoning creates considerable uncertainty about RFRA's scope. At times, courts overlook the full religious objection by characterizing it differently. The court below, for example, held that by "shifting legal responsibility" from themselves to others, the so-

called accommodation option for mandate compliance "relieves rather than burdens [petitioners'] religious exercise." Pet. App. 49a. But petitioners do not find themselves relieved: as the court acknowledged, they have religious objections to taking actions that create legal obligations for this coverage. Pet. App. 58a (objections to playing "a causal role" and to "their continuing involvement in the regulatory scheme"). Petitioners are objecting because their religion views such conduct as prohibited encouragement or facilitation.

At other times, courts proceed, not by recharacterizing the religious obligations whose violation is coerced, but by deeming those obligations "de minimis" or inconsequential. *See Catholic Health Care System v. Burwell*, No. 14-427-CV, 2015 WL 4665049, at *10 (2d Cir. Aug. 7, 2015) (describing the accommodation as a "de minimis burden of notification"); *Priests for Life v. U.S. Dep't of Health & Human Servs.*, 772 F.3d 229, 249 (D.C. Cir. 2014) (concluding that the mandate only requires sending a single sheet of paper and thus that the mandate "imposes a *de minimis* requirement on any eligible organization"); *Geneva Coll. v. Sec'y, U.S. Dep't of Health & Human Servs.*, 778 F.3d 422, 442 (3d Cir. 2015) (deeming the asserted burden insubstantial based on a "qualitative assessment" of how the regulation "imposes on the appellees' exercise of religion").

Departing from both of those approaches, five circuit judges would find a substantial burden. They reject their colleagues' reasoning as amounting to a second-guessing of religious convictions that cannot be reconciled with *Hobby Lobby*. *See Priests for Life*, No.

13-5368, slip op. 11 (May 20, 2015) (Brown, J., dissenting from denial of reh'g en banc, joined by Henderson, J.) (stating that no "law or precedent grants [any court] authority to conduct an independent inquiry into the correctness of this belief"); *id.*, slip op. 8, (Kavanaugh, J., dissenting from denial of reh'g en banc) (same); *Univ. of Notre Dame v. Burwell*, 786 F.3d 606, 627-28 (7th Cir. 2015) (Flaum, J., dissenting) (same); *Eternal Word Television Network, Inc. v. Sec'y, U.S. Dep't of Health & Human Servs.*, 756 F.3d 1339, 1340-41 (11th Cir. 2014) (Pryor, J., concurring) (same). And district judges have likewise disagreed with each other about that approach. *See, e.g.*, *E. Tex. Baptist Univ. v. Sebelius*, 988 F. Supp. 2d 743, 747 (S.D. Tex. 2013) (Rosenthal, J.) ("Several district courts have already issued opinions, with inconsistent results.").

Dissenting in part below, Judge Baldock also gave a nod to the understanding that "the accommodation scheme substantially burdens any religious nonprofit that objects to performing an act that would cause or otherwise make it complicit in providing contraceptive coverage simply because the scheme uses substantial fines to compel an act that the nonprofit sincerely believes would have that effect." Pet. App. 124a-25a. Judge Baldock did not endorse the contrary reasoning of the panel majority, but instead simply accepted it "for argument's sake," to "highlight an even deeper problem lurking within the self-insured accommodation scheme." Pet. App. 122a, 125a. Specifically, even under the majority's articulation of the substantial-burden test, many self-insured employers do "cause the provision and receipt of objected-to coverage" by participating in the Executive's so-called accommoda-

tion. Pet. App. 126a. Judge Baldock did not fully explain why similar logic does not apply for the "insured plaintiffs" as well, in that they, too, are required by mandate to provide plans that inexorably give rise to coverage obligations.

In short, the lower courts' approaches to applying *Hobby Lobby*'s substantial-burden holding, now that the Executive is relying on the alternative method of mandate compliance, has led to substantial confusion. The question has sufficiently percolated in the lower courts, yielding a variety of approaches expressed in lengthy opinions. Delay will not yield clarity or more developed arguments. The Court should now grant review to provide a nationwide answer to the question.

## II. The Costs Of Delay Are Significant Because Religious Adherents, Not Courts, Should Decide Whether Conduct Coerced By Governmental Mandates Conflicts With Sincerely Held Religious Beliefs.

The Court should grant review to underscore the proper standard under RFRA for finding a substantial burden on religious exercise, and it is important to do so now given the demonstrated effects of deviating from this Court's approach in *Hobby Lobby*.

### A. The Improper Substantial-Burden Test Applied Below Adjudicates The Merits Of Adherents' Religious Beliefs.

1. Religious faith and tolerance played a tremendous role in the settlement of the colonies and the founding of the United States. *See, e.g., Town of*

*Greece v. Galloway*, 134 S. Ct. 1811, 1823-24 (2014); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 702-04 (2012). This country has a long tradition of governing so as to meaningfully protect the free exercise of religion. *See, e.g.*, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 523-24 (1993) (noting "the Nation's essential commitment to religious freedom"). By allowing religious adherents exceptions that are equal to other religious and secular exceptions from regulation, our governments respect diverse faiths and govern by making compromises that avoid unnecessary friction between faith and law.

The Executive, however, resists providing the religious believers here the exemption already accorded to their fellow believers operating as a church. Indeed, the exclusion that the Executive refuses to petitioners is narrower than the exclusion of other employers for secular, administrative reasons. Yet the Executive contends that this decision does not substantially burden religious exercise and therefore does not even require scrutiny under RFRA.

Despite this Court's instructions in *Hobby Lobby*, a number of federal courts have now accepted the Executive's invitation to assess the force of a religious conviction. That approach intrudes upon the dignity of adherents' convictions about profound religious concepts involving facilitation or complicity. It subjects those beliefs to judicial review, as if courts are well situated to determine the substantiality of the reasons of faith animating a believer's desired exercise of religion, as opposed to the substantiality of the governmental burden on that religious exercise. That is not

the inquiry required by RFRA, a bipartisan enactment reflecting the spirit of religious tolerance that this country holds dear.[3]

2. In determining whether a RFRA substantial burden exists, courts have not been permitted to assess the validity of a religious prohibition against particular conduct. That determination is for adherents of the religion. Under RFRA's substantial-burden analysis, courts should instead address (1) whether the religious belief that one must act or refrain from acting in a given way is sincere, and (2) whether the challenged governmental action creates substantial coercion to act contrary to that religious conviction.

As this Court explained in *Hobby Lobby*, federal courts have no business resolving a "difficult and important question of religion and moral philosophy, namely, the circumstances under which it is wrong for a person to perform an act that is innocent in itself but that has the effect of enabling or facilitating the commission of [what the person believes to be] an immoral act by another." 134 S. Ct. at 2778. But that is what the court of appeals' analysis here does. *See, e.g.*, Pet. App. 48a (disagreeing with petitioners' religious objection that "the administrative tasks required to opt out

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[3] The House and Senate approved RFRA in an almost unanimous vote. 130 Cong. Rec. S14,471 (Oct. 27, 1993); 139 Cong. Rec. H2363 (May 11, 1993); *see also* Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 Tex. L. Rev. 209, 210-11 n.9 (1994) (describing RFRA's bipartisan support).

of the Mandate make them complicit in the overall delivery scheme," and concluding instead that the accommodation "relieves them from complicity"); Pet. App. 48a-49a (concluding that "shifting legal responsibility . . . relieves rather than burdens their religious exercise"); Pet. App. 62a-63a ("disagree[ing]" with petitioners' objection that the accommodation scheme "makes them complicit in the larger delivery scheme"); Pet. App. 64a ("The regulations do not burden the religious exercise of employers using insured plans."); Pet. App. 85a (deeming petitioners' religious objection to the regulations on complicity grounds "unconvincing").

Time and again, this Court has refused to question the boundaries, importance, or validity of a person's religious beliefs. *See, e.g.*, *Hobby Lobby*, 134 S. Ct. at 2779 ("[I]t is not for us to say that [petitioners'] religious beliefs are mistaken or insubstantial."); *Emp't Div. v. Smith*, 494 U.S. 872, 887 (1990) ("Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim."); *Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989) ("It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds."); *Thomas v. Review Bd.*, 450 U.S. 707, 716 (1981) ("[I]t is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation."); *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S.

440, 450 (1969) (noting that courts lack authority to decide "the interpretation of particular church doctrines and the importance of those doctrines to the religion").

There is no dispute about the sincerity of petitioners' conviction. *See* Pet. App. 55a & n.24. There is also no dispute about the religious nature of their objection to their "continuing involvement in the regulatory scheme." Pet. App. 58a. Nor is there any doubt that the penalty for failing to comply would be severe. *See* Pet. App. 35a; *see also* 26 U.S.C. § 4980D (imposing a penalty of $100 per day per affected individual); 26 U.S.C. § 4980H (imposing a penalty of $2000 per year per full-time employee). Nevertheless, the court found petitioners' sincerely held religious belief "unconvincing." Pet. App. 85a ("They wish to play no part in it. We find this argument unconvincing . . . ."). But the persuasiveness of that religious view about how petitioners must conduct their affairs is not for the courts to decide.

3. Even if courts could check for the reasonableness of an adherent's religious conviction about complicity or facilitation, the court of appeals' application of that test in this case is problematic. The court effectively second-guessed petitioners' religious objections by finding that coercion to take a particular course of conduct does not pressure petitioners into violating their religious beliefs. Pet. App. 85a-95a.

The court below noted that for both insured and self-insured employers, "the ACA [combined with the regulations] requires that group health plans cover contraceptive services, and a plaintiff knows coverage

will be provided when it opts out." Pet. App. 72a. "When an organization takes advantage of the accommodation, the ACA requires health insurers to provide [administratively mandated contraception] coverage for *insured* group health plans." Pet. App. 33a (emphasis added). Although the Tenth Circuit tries to characterize the insurer's obligation as "independent" of the employer, *see* Pet. App. 64a, the insurer's obligation arises only because the religious nonprofit employer has acted (pursuant to mandate) to retain that insurer, Pet. App. 19a-20a, and then further comply with the mandate through its "accommodation" option. Even then, the insurer's obligation is inextricably linked to the employer because contraceptive coverage is limited to "plan participants and beneficiaries for so long as they remain enrolled in the plan." Pet. App. 60a-61a.

When a religious nonprofit with *a self-insured plan* objects to providing contraceptive coverage to its employees, the plan's third-party administrator (TPA) "is notified that . . . it must provide or arrange for contraceptive coverage without cost sharing if it wishes to continue administering the plan. The TPA is authorized and obligated to provide the coverage guaranteed by the ACA *only if* the religious non-profit organization that has primary responsibility for contraceptive coverage opts out of providing it." Pet. App. 67a (citations omitted) (emphasis added). Again, the TPA's obligation arises only because the employer has acted, pursuant to mandate, to provide the insurance. And the document required under the "accommodation" option for mandate compliance "shall be an instrument under which the plan is operated, shall be treated as a designation [by the religious employer] of

the third party administrator as the plan administrator . . . for [the products], and shall supersede any earlier designation." Pet. App. 233a; *see* Pet. App. 261a (Form 700 stating its legal effect as "an instrument under which the plan is operated").

Even under this "accommodation" means of mandate compliance, then, it is an employer's mandated act of offering a plan coupled with the document required of objectors that generates the legal obligation and authority to pay for contraception. The insurer or third-party administrator becomes responsible for providing contraceptive coverage only when the religious nonprofit employer has a mandated "insured" plan or "self-insured" plan and has complied with the so-called accommodation. *See* Pet. App. 29a-33a.

The court of appeals understood that the religious organizations here perceive a religious obligation against providing health insurance that will trigger, encourage, or otherwise facilitate the provision of objected-to drugs to their employees. *See, e.g.*, Pet. App. 58a-60a. That obligation is founded on religious views about facilitation or encouragement of what is deemed objectionable conduct, not on legal distinctions about whether the payments are made through a plan's infrastructure or pursuant to some other duty that applies only because the employer hired a given issuer or administrator. Nonetheless, the court of appeals concluded that the religious employers' anti-facilitation principle is "unconvincing." Pet. App. 85a. Although petitioners' principle rests on *religious* judgments, the court offered only *legal* distinctions immaterial to that religious view.

First, the court concluded that the accommodation scheme was designed "to ensure that Plaintiffs are *not* complicit" in providing contraception. Pet. App. 86a. But bureaucratic purpose cannot dictate religious belief. In any event, that design of the accommodation is cancelled out by its purpose to "ensure[] plan participants and beneficiaries will receive the contraceptive coverage" via the employer's contracted insurer or TPA. Pet. App. 68a. That forced facilitation of contraceptive coverage is central to the religious nonprofits' objection.

Second, the court held that petitioners' religious objection is "not a sufficient predicate for a RFRA claim" because it is based on an "erroneous view" of the contraceptive mandate's regulatory scheme. Pet. App. 86a. But, as the court itself described, the regulatory scheme requires petitioners to provide group health plans that result in the objected-to coverage through the administrative apparatus of those plans.

Third, the court decided that the accommodation scheme imposed only "*de minimis* administrative tasks" that do not amount to a substantial burden. Pet. App. 88a. But that confuses the substantiality question. The burden on religious exercise is the financial liability coercing compliance with the mandate. And nobody questions that the financial coercion is substantial.

Three basic points should resolve the burden issue:

- The employers hold a sincere "religious belief that they may not provide, pay for, or facilitate contraceptive coverage." Pet. App. 58a.

- The employers are mandated to provide insurance plans that are a prerequisite to petitioners' contractors having to cover the relevant drugs. *See* Pet. App. 19a-20a (employer-sponsored group health plans must cover "the full range of FDA-approved contraceptive services").

- An employer that wants to follow the dictates of conscience by not providing that link faces draconian penalties. Pet. App. 34a-35a.

That is enough to trigger Congress's requirement that such regulatory schemes receive scrutiny to ensure they appropriately account for those sincere religious beliefs.

Of course, not all religious believers will conclude that their conduct in directly causing coverage for contraceptives makes the believers complicit in those drugs' use or consequences. But petitioners here do hold that sincere religious belief, and it does not rest on a legal mistake about the regulatory scheme.

4. *Hobby Lobby* should thus resolve the substantial-burden inquiry. Indeed, the court of appeals recognized that the violation in *Hobby Lobby* arose because the plaintiffs were put to the choice of either complying with the contraceptive mandate, which violated their religious convictions, or "not complying

and paying significant penalties." Pet. App. 18a. The court further recognized that "substantiality does not permit us to scrutinize the 'theological merit' of a plaintiff's religious beliefs—instead, we analyze 'the intensity of the coercion applied by the government to act contrary to those beliefs.'" Pet. App. 55a (quoting *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114, 1137 (10th Cir. 2013)). But simply asserting that an employer's provision of insurance is "independent" from the relevant coverage obligations (Pet. App. 64a, 84a-87a) does not make it so. And courts have no place judging whether the degree of attenuation presents meaningful religious concerns for those who must comply with the mandate.

The court of appeals' finding of "independen[ce]" cannot trump religious adherents' beliefs regarding participation and facilitation. *Cf.* Pet. App. 63a-65a. Just as a court must respect a religious adherent's view that manufacturing sheet metal is permissible while manufacturing tank turrets makes him too complicit in wrongdoing, *Thomas*, 450 U.S. at 715, the court of appeals' own view of how much separation is enough is of no relevance here. *Hobby Lobby*, 134 S. Ct. at 2779.

### B. The Federal Executive's Regulatory Overreach Intrudes On Religious Liberty.

The Executive Branch's contraceptive mandate is the latest example of an attempted aggrandizement of agency authority. *See, e.g.*, *Hosanna-Tabor*, 132 S. Ct. at 706 (unanimously rejecting EEOC's suit against a church for its decisions about employment of a com-

missioned minister, and dismissing EEOC's "remarkable view that the Religion Clauses have nothing to say about a religious organization's freedom to select its own ministers"); *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2444 (2014) (rejecting EPA's interpretation of the Clean Air Act to authorize rewriting statutory thresholds for greenhouse-gas emissions in part "because it would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization").

The Executive's refusal to exempt objecting religious employers from the contraceptive mandate—a mandate that already excludes churches, small employers, and employers with grandfathered plans—is difficult to square with an attitude of respectful accommodation of religious exercise. This is particularly true in light of the government's position that its regulatory objective would not even be accomplished by forcing the Little Sisters (and other co-petitioners with self-insured church plans) to comply with the accommodation scheme. *See* Pet. 20; *see also* Pet. App. 79a-81a. Nonetheless, the coercion to comply is severe. Pet. App. 34a-35a. RFRA was meant to require at least *scrutiny* of a religious adherent's claim for an exemption from such a scheme.

### C. Exempting Religious Nonprofits Would Afford Them Equal Treatment With Like Adherents.

Most churches, small employers, and employers with grandfathered plans are not covered by the Executive's contraceptive mandate. There is no reason to

think that the Executive could not in like manner exempt religious nonprofits who identify themselves as having the same religious objection that animates the exemption for churches.

The fact that the government already excludes so many employers from the coverage mandate is strong evidence that the government can further its interests here with means less that are restrictive of religious liberty. The Executive cannot suggest that adherents' religious convictions differ when they meet on Sunday to determine insurance arrangements for employees of their church and when they meet on Monday to determine insurance arrangements for employees of a church-affiliated charity or school. In the former scenario, the Executive has determined that methods other than the mandate will meet its interest in promoting access to contraceptives while respecting religious employers' beliefs. By necessity, those same methods will achieve the government's interest while respecting other religious employers' beliefs.

And the Executive has not seriously attempted to show that its alternative form of compliance with the mandate—what it calls an "accommodation"—is the method least restrictive of religious exercise for achieving a compelling governmental interest. Rather than focusing on interests framed broadly, RFRA demands "a more focused inquiry" on "application of the challenged law to the person." *Hobby Lobby*, 134 S. Ct. at 2779 (internal quotation marks omitted); *see id.* at 2779-80 (assuming the existence of "compelling" interests framed broadly but requiring a focus on the governmental interest in the mandate to petitioners).

That focus is on conscripting *these religious employers* into the government's regulatory scheme.

Such conscription cannot be the means least restrictive of religious exercise for achieving a compelling governmental interest given the existing carve-outs for numerous employers, on grounds both secular and religious. Rather than coercing employers into violating their religious beliefs, the Executive can rely on the methods it has already found acceptable with regard to employers not subject to the mandate. Those methods may be providing coverage via the government's health exchanges, providing a tax subsidy or refund, or directly subsidizing the contraception at participating pharmacies. *See generally id.* at 2781 n.37.

### D. Religious Nonprofits Are A Vital Thread In States' Social Fabric And Should Be Given Latitude To Operate In Accordance With Their Animating Religious Beliefs.

The Executive's refusal to equally exclude all religious objectors from the contraceptive mandate betrays a lack of proper concern for federal law that protects religious liberty. Religious charities, schools, and other nonprofits feel that burden heavily. *See id.* at 2785 (Kennedy, J., concurring) ("For those who choose [to believe in a divine creator], free exercise is essential in preserving their own dignity and in striving for a self-definition shaped by their religious precepts.").

The host of religious objectors to the contraceptive mandate include theological seminaries, schools and

colleges, orders of nuns, and charities caring for indigent elderly and orphans. They have avowedly religious missions, and their missions are part of what drives them to operate with a motive not to profit, but to contribute to societies across the nation in their own unique ways. The heavy religious burden that the Executive's mandate imposes on nonprofits faithfully serving their communities may well detract from the vigor with which they serve and even their willingness to serve at all. The *amici* States thus respectfully urge that the Court pay close attention to the important interests of these vital institutions.

## CONCLUSION

The petition for a writ of certiorari should be granted, and the judgment of the court of appeals should be reversed.

Respectfully submitted.

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## ADDENDUM

## "STATE RFRA" PROVISIONS

- Arizona: Ariz. Rev. Stat. § 41-1493.01
- Arkansas: 2015 SB 975, enacted April 2, 2015
- Connecticut: Conn. Gen. Stat. § 52-571b
- Florida: Fla. Stat. § 761.01 et seq.
- Idaho: Idaho Code § 73-402
- Illinois: 775 Ill. Comp. Stat. § 35/1 et seq.
- Indiana: 2015 SB 101, enacted March 26, 2015; 2015 SB 50, enacted April 2, 2015
- Kansas: Kan. Stat. § 60-5301 et seq.
- Kentucky: Ky. Rev. Stat. § 446.350
- Louisiana: La. Rev. Stat. § 13:5231 et seq.
- Mississippi: Miss. Code § 11-61-1
- Missouri: Mo. Rev. Stat. § 1.302
- New Mexico: N.M. Stat. § 28-22-1 et seq.
- Oklahoma: Okla. Stat. tit. 51, § 251 et seq.
- Pennsylvania: 71 Pa. Stat. § 2403
- Rhode Island: R.I. Gen. Laws § 42-80.1-1 et seq.
- South Carolina: S.C. Code § 1-32-10 et seq.
- Tennessee: Tenn. Code § 4-1-407
- Texas: Tex. Civ. Prac. & Rem. Code § 110.001 et seq.
- Virginia: Va. Code § 57-1 et seq.